Hanhyo Sdn Bhd v Marplan Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S7-22-56 OF 1988
LIM BENG CHOON J
21 JUNE 1991

Civil Procedure *— Discontinuance of action — Judgment against one defendant — Plaintiff filing notice of discontinuance against another defendant — Whether leave required — Whether notice should be set aside — Rules of the High Court 1980 O 19 r 2 & O 21 r 2*

The plaintiff was a specialist sub-contractor appointed by the first defendant. The first defendant was in turn a nominated sub-contractor of the second defendant. The second defendant was the contractor for the construction of a building. The third defendant was the firm of architects supervising the project. The plaintiff claimed that it had completed all works and the third defendant had issued progress payment certificates to the second defendant. The plaintiff claimed the money due to them under the certificate in a suit ('the first suit') against the first defendant. However, the plaintiff's injunction restraining the second defendant from paying moneys due to the first defendant was set aside by the Supreme Court. The plaintiff then filed a notice of discontinuance of the first suit and at the same time commenced the present suit against all three defendants. On the same day the plaintiff obtained on an ex parte application an injunction directing that the funds in the banks of the second defendant and due to the first defendant for the works executed be preserved in the second defendant's custody pending further order.

The first defendant then filed an application in the present suit for an order, inter alia, that the indorsement of the writ of summons and the statement of claim be struck out on the grounds that the same were frivolous and vexatious or an abuse of the process of the court.

The second and third defendants did not enter appearance and the plaintiff obtained an order, inter alia, that the second defendant do pay to the plaintiff directly all sums certified by the third defendant as due to the plaintiffs. The plaintiff then filed a notice of discontinuance of the present action against the first defendant. On the plaintiff's application, the court dissolved the interlocutory injunction granted in the present suit on the ground that the final judgment obtained against the second defendant rendered the injunction nugatory.

The first defendant contended, inter alia, that although the plaintiff had the unqualified right under O 21 r 2(1) of the Rules of the High Court 1980 to discontinue its action against the first defendant without leave of the court before the service of the defence on the plaintiff, yet if the plaintiff abused such right by serving a notice of discontinuance which would cause injustice to the first defendant and/or was nothing more than an abuse of the process of the court, the court then had the power to set aside the notice of discontinuance. It was further contended that the discontinuance would deprive the first defendant

of the right already accrued to it in its summons for the setting aside of the injunction. A

Held, granting leave to the plaintiff to discontinue its action against the first defendant, subject to conditions:

(1) The court would not compel a plaintiff to continue his action against a defendant if he does not want to do so provided no injustice is caused to the defendant. Injustice would be caused to the defendant if: (a) the discontinuance was made with ulterior motive to obtain a collateral advantage; (b) the discontinuance was not made bone fide by the plaintiff but was made in order to obtain an advantage which he has no right to retain since he has ceased to be dominis litis as the defendant has a perfectly good defence; or (c) by the discontinuance of the action the defendant would be deprived of an advantage which he has already gained in the litigation. B C

(2) It certainly could not be said that the plaintiff's filing of the notice of discontinuance was done with an ulterior motive to gain a collateral advantage. Having got judgment in default of appearance and defence against the second defendant, the plaintiff was entitled to require the second defendant to pay all moneys lawfully due to the plaintiff. In the circumstances, the plaintiff had no reason to continue the action against the first defendant against whom the plaintiff was also claiming moneys due to it under the sub-contract. D E

(3) By asking for an order, inter alia, for stay of the proceedings, it certainly could not be said that the first defendant had obtained an advantage in the litigation of which it would be deprived if the plaintiff were allowed to discontinue the action against the first defendant. F

(4) As there was no injunction in existence any more and in view of the order of the senior assistant registrar, the question of whether the injunction was rightly or wrongly granted was purely academic. G

(5) In view of the provisions of O 19 r 2 and O 21 r 2 of the Rules of the High Court 1980 and the fact that the plaintiff had been too late in filing the notice of discontinuance, the notice was bad and should be rejected. The plaintiff must get the leave of the court to file the notice of discontinuance as the time fixed for filing of the notice of discontinuance without leave had already expired. H

(6) However, had the plaintiff sought leave to discontinue as it should have done, the logical course for the court would have been to give such leave simply because it was pointless to continue the action against the first defendant in the circumstances. Leave to discontinue the action against the first defendant was therefore granted, subject to certain conditions. I

[Bahasa Malaysia summary

Plaintiff adalah kontraktor kecil pakar yang dilantik oleh defendan pertama. Defendan pertama pula adalah kontraktor kecil penamaan

defendan kedua. Defendan kedua adalah kontraktor pembinaan sebuah bangunan. Defendan ketiga adalah firma arkitek yang menyelia projek. Plaintif menuntut bahawa ia telah menyempurnakan semua kerja-kerja dan defendan ketiga telah mengeluarkan sijil pembayaran berperingkat kepada defendan kedua. Plaintif menuntut wang yang kena dibayar kepada mereka di bawah sijil-sijil dalam satu guaman ('guaman pertama') terhadap defendan pertama. Akan tetapi, injunksi plaintif yang menghalang defendan kedua daripada membayar wang-wang yang kena dibayar kepada defendan pertama telah diketepikan oleh Mahkamah Agung. Plaintif kemudiannya memfail satu notis pemberhentian guaman pertama dan pada masa yang sama memulakan guaman ini terhadap ketiga-tiga defendan. Pada hari yang sama, plaintif memperolehi atas suatu permohonan ex parte satu injunksi yang mengarahkan supaya wang defendan kedua dalam bank dan kena bibayar kepada defendan pertama untuk kerja-kerja yang dilaksanakan disimpan dalam jagaan defendan kedua sementara menunggu perintah lanjut.

Defendan pertama kemudiannya memfail satu permohonan dalam guaman ini untuk suatu perintah, antara lainnya, bahawa pengindorsan writ saman dan pernyataan tuntutan dibatalkan atas alasan-alasan bahawa ianya adalah remeh dan menyusahkan atau suatu penyalah-gunaan proses makkamah. Defendan-defendan kedua dan ketiga tidak memasukkan kehadiran dan plaintif memperolehi satu perintah, antara lainnya, bahawa defendan kedua membayar kepada plaintif secara terus semua jumlah wang yang disahkan oleh defendan ketiga sebagai kena dibayar kepada plaintif. Plaintif juga memfail satu notis pemberhentian tindakan ini terhadap defendan pertama. Atas permohonan plaintif, mahkamah membubarkan injunksi interlokutori yang diberi dalam guaman ini atas alasan bahawa penghakiman muktamad yang didapati terhadap defendan kedua menjadikan injunksi itu tidak penting lagi.

Defendan pertama berhujah, antara lainnya, bahawa sungguhpun plaintif mempunyai hak tanpa bersyarat di bawah A 21 k 2(1) Kaedah-Kaedah Mahkamah Tinggi 1980 untuk menghentikan tindakannya terhadap defendan pertama tanpa kebenaran mahkamah sebelum penyerahan pembelaan atas plaintif, akan tetapi sekiranya plaintif menyalahgunakan hak sedemikian dengan menyerahkan satu notis pemberhentian yang akan menyebabkan ketidakadilan kepada defendan pertama dan/atau yang merupakan tidak lebih daripada penyalahgunaan proses mahkamah, mahkamah dengan itu mempunyai kuasa mengetepikan notis pemberhentian itu. Adalah juga dihujah bahawa pemberhentian itu akan melucutkan hak defendan pertama yang telah terakru kepadanya dalam samannya untuk mengetepikan injunksi itu.

Diputuskan, memberi kebenaran kepada plaintif untuk memberhentikan tindakannya terhadap defendan pertama, tertakluk kepada syarat:

(1) Mahkamah tidak akan memaksa seorang plaintif meneruskan tindakannya terhadap seorang defendan sekiranya beliau tidak mahu berbuat demikian atas syarat tidak ada ketidakadilan

dikenakan ke atas defendan. Ketidakadilan akan dikenakan kepada defendan sekiranya: (a) pemberhentian adalah dibuat dengan motif terselindung untuk mendapat satu kelebihan kolateral; (b) pemberhentian itu tidak dibuat dengan bona fide oleh plaintif tetapi dibuat supaya mendapat satu kelebihan yang bukan haknya memandangkan yang dia telah berhenti menjadi dominis litis kerana defendan mempunyai satu pembelaan yang amat baik; atau (c) dengan pemberhentian tindakan itu defendan akan dilucutkan suatu kelebihan yang telah diperolehinya di dalam litigasi itu.

(2) Tidak boleh dikatakan bahawa pemfailan notis pemberhentian oleh plaintif telah dilakukan dengan tujuan terselindung mendapatkan satu kelebihan kolateral. Setelah mendapat penghakiman ingkar kehadiran dan pembelaan terhadap defendan kedua, plaintiff berhak menghendaki defendan kedua membayar kesemua wang yang secara sahnya kena dibayar kepada plaintif. Dalam keadaan sedemikian, plaintif tidak ada sebab untuk meneruskan tindakan terhadap defendan pertama terhadap siapa plaintif juga menuntut wang yang kena dibayar di bawah kontrak kecil.

(3) Dengan memohon suatu perintah, antara lainnya, untuk penggantungan prosiding, sudah tentunya tidak boleh dikatakan bahawa defendan pertama telah mendapat suatu kelebihan di dalam litigasi itu yang akan dilucutkan daripadanya jika plaintif dibenarkan untuk memberhentikan tindakan ini terhadap defendan pertama.

(4) Oleh kerana tidak ada injunksi yang masih wujud dan memandangkan perintah penolong kanan pendaftar, soalam sama ada injunksi itu telah diberi dengan salah atau betul adalah soalan akademik semata-mata.

(5) Oleh kerana peruntukan A 19 k 2 dan A 21 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 dan hakikat bahawa plaintif telah terlambat dalam memfailkan notis pemberhentian, notis itu adalah tidak baik dan sepatutnya ditolak. Plaintif mesti mendapat kebenaran mahkamah untuk memfail notis pemberhentian kerana masa yang ditetapkan untuk pemfailan notis pemberhentian tanpa kebenaran telah luput.

(6) Namun demikian, sekiranya plaintif telah memohon kebenaran untuk menghentikan tindakan itu seperti yang sepatutnya dibuat oleh beliau, jalan yang logik untuk mahkamah adalah memberi kebenaran semata-mata kerana tidaklah bermenafaat untuk meneruskan tindakan terhadap defendan pertama dalam keadaan ini. Kebenaran untuk menghentikan tindakan terhadap defendan pertama dengan itu dibenarkan, tertakluk kepada syarat-syarat tertentu.]

Cases referred to

1 *Fox v Star Newspaper Co* [1898] 1 QB 636 (refd)
2 *Goldsmith v Sperring Ltd* [1977] 2 All ER 566 (refd)
3 *Castanho v Brown & Root (UK) Ltd & Anor* [1980] 3 All ER 72 (refd)
4 *Castanho v Brown & Root (UK) Ltd & Anor* [1981] AC 557 (folld)

A 5 *Oversea Union Finance v Lim Joo Chong* [1971] 2 MLJ 124 (folld)
6 *Khoo Chin Inn & Anor v Reliance Enterprise Sdn Bhd & Ors* [1976] 1 MLJ 35 (folld)
7 *Robertson v Purdey* [1906] 2 Ch 615 (refd)
8 *Covell Matthews & Partners v French Wools Ltd* [1977] 2 All ER 591 (folld)

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Legislation referred to
Arbitration Act 1952 s 6
Moneylenders Ordinance 1951 s 16
Rules of the High Court 1980 O 18 r 19, O 19 r 2, O 21 rr 2, 3
C Rules of the Supreme Court 1957 O 26 r 1
Rules of the Supreme Court [UK] O 21 r 2(1)
Landlord and Tenant Act 1954 [UK] ss 24, 24A, 29(2)

M Pathmanathan (*Yusof Lee Pathma & Marbeck*) for the plaintiff.
Sri Ram (*Sri Ram & Co*) for the first defendant.

D

Cur Adv Vult

Lim Beng Choon J: The sole question posed to this court is whether the plaintiff was entitled to discontinue this action commenced by it against the E first defendant thereby depriving the first defendant the rights allegedly already accrued to it in its summons to set aside the injunction obtained by the plaintiff on 4 March 1988.

In order to understand the issues which give rise to the aforesaid question it is necessary to refer briefly to the history of the proceedings leading to the application of the first defendant to set aside the said injunction.

F On 7 July 1987 the plaintiff instituted an earlier suit dated 7 July 1987 ('the first suit') naming Marplan Sdn Bhd as the sole defendant. The plaintiff was a specialist sub-contractor appointed by the defendant who in turn was the nominated sub-contractor of the contractor Bina Goodyear Sdn Bhd for the construction of the Selangor State Mosque at Shah Alam. G The plaintiff had completed all works and the architect Jurubena Bertiga International has issued some progress payment certificates to Bina Goodyear Sdn Bhd and the plaintiff therefore claimed the money due to them under the certificates. Simultaneously with the filing of the first suit, the plaintiff also applied and obtained an interim injunction by which Bina Goodyear Sdn Bhd was restrained from paying all moneys that were due or became H due and payable to Marplan Sdn Bhd up to the sum of $2,754,895.50. The injunction order appears in the appeal record of the Supreme Court of Malaysia (Appellate Jurisdiction) Civil Appeal No 502 of 1988 (hereinafter referred to as 'the appeal record') at p 16. On 15 July 1987 Marplan Sdn Bhd applied by way of summons-in-chambers to set aside the injunction I of 7 July 1987 and also to stay the proceedings pursuant to s 6 of the Arbitration Act 1952. The prayers to set aside the injunction was dismissed by the trial judge and Marplan Sdn Bhd appealed to the Supreme Court against the decision of the trial judge. When the appeal came on for hearing before the Supreme Court on 11 March 1988 the Supreme Court allowed

the appeal on the ground that the High Court had no power to grant an injunction to restrain Bina Goodyear Sdn Bhd from paying out the moneys when it was not a party to the action. Thereafter on 14 March 1988 the plaintiff filed a notice of discontinuance of the first suit and at the same time commenced this suit naming Marplan Sdn Bhd as the first defendant, Bina Goodyear Sdn Bhd as the second defendant and Jurubena Bertiga International as the third defendant. The reliefs sought as against the first defendant was payment of $2,754.595.50 for works done under the specialist subcontract and as against the second defendant an order directing it to pay the plaintiff directly all sums certified by the third defendant and finally as against the third defendant an order directing them to value and certify all amounts due from the first defendant to the plaintiff under progress payment certificate Nos 40 to 44. Again on the same day the plaintiff applied by way of ex parte summons-in-chambers for an injunction directing that the funds in the banks of the second defendant and due to the first defendant for works executed in respect of the state mosque Shah Alam up to the sum of $2,754,595.50 be preserved in the second defendant's custody pending further order of this court (see encl 3 of the court file). This court granted the injunction prayed for subject to the usual undertaking to abide by any order the court should make as to damages (see encl 5). It is not disputed that the notice of discontinuance dated 14 March 1988 was served on the solicitors for the first defendant only on 31 March 1988. It was also on the same date that solicitors for the first defendant was informed of the institution of this suit. On 4 April 1988 the first defendant through its solicitors wrote a letter to the solicitors of the plaintiff objecting to the discontinuance of the first suit and the commencement of this suit prior to the service of the notice of discontinuance on them (see p 51 of the appeal record). The first defendant thereupon filed an application by way of summons-in-chambers on 15 April 1988 to set aside and/or to strike out the plaintiff's notice of discontinuance on the grounds that the same was irregular and/or an abuse of the process of court (see p 22 of the appeal record). The first defendant then brought the matter on appeal to the Supreme Court on 21 November 1988. The Supreme Court disallowed the appeal and upheld the decision of the trial judge.

Earlier on 15 April 1988 the first defendant had entered a conditional appearance followed by an application by way of summons-in-chambers dated 20 April 1988 for an order that:

(a) the indorsement of the writ of summons and the statement of claim be struck out under the Rules of the High Court 1989, O 18 r 19 and/or under the inherent jurisdiction of the court; on the ground that the same is frivolous or vexatious or an abuse of the process of this honourable court;

(b) further or alternatively, that the injunction therein granted ex parte by the order of the Honourable Mr Justice Dato Ajaib Singh on 14 March 1988 be discharged, dissolved or set aside;

(c) (i) further or alternatively, that this action and all further proceedings hereinafter be stayed pursuant to O 12 r 5 of the Rules of High Court 1980 until the costs payable by the plaintiff to the first defendant as ordered by the Supreme Court of Malaysia on 11 March 1988 in Supreme Court Civil Appeal 466 of 1987 shall have been paid by the plaintiff to the first defendant;

(ii) that if such be not paid within 14 days of service of the taxing officer's certificate(s) this action be dismissed with cost including costs of this application.

(d) further or alternatively, that this action and all further proceedings hereinafter be stayed pursuant to s 6 of the Arbitration Act 1952 on the grounds that the plaintiff and the first defendant having by an agreement in writing dated 27 March 1986, agreed to refer to arbitration the matter in respect of which this action is commenced;

(e) costs of and occasioned by this application be provided for;

(f) that such further orders or directions be made or given as this honourable court deems just in the circumstances.

In the meantime the plaintiff was granted a certificate of non-appearance on 25 March 1989 against the second defendant, Bina Goodyear Sdn Bhd, who had been duly served with the writ and statement of claim in this action. Likewise a certificate of non-appearance had also been granted to the plaintiff against the third defendant, Jurubena Bertiga International, also on 25 March 1989. In addition on 25 March 1989 the plaintiff applied by way of a summons-in-chambers (see encl 22) for an order that the plaintiffs be given leave to enter judgment against the second and third defendants. The said summons were duly served on the second and third defendants. The plaintiff's application was heard by the senior assistant registrar of this court on 31 March 1989 who made the following order (see encl 30):

> ... it is hereby ordered that the plaintiffs be given leave to enter judgment against the second defendants and it is further ordered that the second defendants do pay the plaintiffs directly all sums certified by the third defendants as due to the plaintiffs within two days from the date of service of this order and it is lastly ordered that the second defendants do pay the plaintiffs $350 costs.

Finally a notice of discontinuance against the first defendant dated 22 June 1990 was filed by the plaintiff on 23 June 1990 and was sent by fax apparently to the first defendant's solicitors on the date of filing of the same.

The contentions of counsel for the plaintiff as stated in his submission may be briefly summarized as follows. As the final judgment against the second defendant rendered the plaintiff's claim against the first defendant unnecessary, the plaintiff was obliged to discontinue the present suit against the first defendant and accordingly did so on 22 June 1990. The said discontinuance was made under O 21 r 2(1) as the first defendant did not file any statement of defence. The plaintiff had also applied to set aside the injunction obtained by it on 14 March 1988 and its application was allowed by this court on 12 October 1990 (encl 44). Hence the first defendant's application and insistence to proceed with its application to set aside the writ and statement of claim of this action and to revoke the injunction when the first defendant was no longer a party to this action is wholly misconceived.

Counsel for the defendant, on the other hand, submitted that the first defendant could not file a formal statement of defence because had it done so the arbitration point would have been lost to the first defendant as it would have amounted to a step in the action. Discontinuance could be granted if no injustice was occassioned to the defendant and counsel cited

three authorities to support this proposition. Counsel argued that in the present case the injunction of 14 March 1985, though directed at the second defendant, in substance, affected the first defendant's rights. Discontinuance would deprive the first defendant of the right already accrued to it in its summons to set aside the injunction. He then went on to contend that the first defendant was in *dominus litis* because of its ability to demonstrate a strong prima facie case warranting the dissolution of the injunction. If the plaintiff was permitted to discontinue the action against the first defendant, it would be tantamount to letting the plaintiff have the benefit of an order which it could not on the merits sustain. It had used the process of the court to obtain an advantage which it was not entitled to in the first place and then wanted to hold on to that advantage by means of another process of the court, namely, the provision of discontinuance. He therefore asked the court to decline to act on the notice of discontinuance and proceed to hear the first defendant's summons to dissolve the injunction.

In considering whether the points raised by counsel for the plaintiff are right and the points raised by counsel for the first defendant are wrong or vice versa, one important point which I had taken into consideration in my deliberation of the case is that the first defendant has not contended that in discontinuing the action against the first defendant the plaintiff has failed to comply with the provisions of O 21 r 2(1) of the Rules of the High Court 1980 ('the RHC') except that its counsel in his submission said that the notice of discontinuance should not be filed on 22 June 1990 before the said notice had been served on the first defendant on 23 June 1990. Counsel for the first defendant was wrong because although the notice of discontinuance was dated 22 June 1990 it was not filed until 23 June 1990 which was the same date as the service of the notice on the first defendant (see encl 37A). Even assuming that the plaintiff had filed the notice on 22 June 1990 (which it did not so do) the most that could be said would be that the discontinuance would not take effect until the service of the notice of the first defendant on 23 June 1990. However that may be, the submission of counsel for the first defendant was focused on the legal principle that although the plaintiff had the unqualified right under O 21 r 2(1) of the RHC to discontinue its action against the first defendant without leave of the court before the service of the defence on the plaintiff, yet if the plaintiff abused such right by serving a notice of discontinuance which would cause injustice to the defendant and/or was nothing more than an abuse of the process of court, the court then had the power to set aside the notice of discontinuance. The grounds relied upon by counsel to support his contention have been set out by me and I need no repeat them. Counsel had cited the following cases: *Fox v Star Newspaper Co*;[1] *Goldsmith v Sperring Ltd*;[2] *Castanho v Brown & Root (UK) Ltd & Anor*;[3] *Castanho v Brown & Root (UK) Ltd*;[4] *Oversea Union Finance Ltd v Lim Joo Chong*;[5] *Khoo Chin Inn & Anor v Reliance Enterprise Sdn Bhd & Ors*;[6] *Robertson v Purdey*;[7] and *Covell Matthews & Partners v French Wools Ltd*.[8]

Of the eight cases it is my considered opinion that only three cases are worthy of consideration, namely, the House of Lords case of *Castanho*,[4] *Oversea Union Finance*[5] and *Covell*[8] in respect of the contention raised by counsel for the defendants. I shall therefore first deal with the remaining

cases which are not relevant. In the *Fox* case[1] the plaintiff applied to be non-suited under the old English procedure rules of 1875 which had been repealed by the rules of 1883 and it was held by AL Smith LJ that as the old rules governing non-suiting had been revoked by the new rules of 1833 which provided that, after a certain stage, the plaintiff could not without leave of the court discontinue the action. Furthermore the pleadings in that case were closed and the case was ready for trial after the swearing in of the jury. Hence Chitty LJ in the same appeal said at p 638 of the reported case:

> The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer dominus litis, and it is for the judge to say whether the action shall be discontinued or not and upon what terms.

The case of *Goldsmith v Sperring*[2] merely laid down the general principle that in as much as it could be an abuse of the court in a premature termination of an action, this principle applies equally well to the institution of an action which is tantamount to an abuse of the process of the court.

The points of law raised in *Castanho*[3] and the principles laid down therein have been subsequently dealt with when that case was moved on appeal to the House of Lords — see *Castanho v Brown Root (UK) Ltd & Anor.*[4]

As to *Khoo*'s case,[5] it dealt with O 26 r 1 of the old Rules of Supreme Court 1957, and the learned trial judge held that as the plaintiff had taken all the necessary steps pursuant to the said rule, he had the right to discontinue the action instituted by him.

Robertson v Purdey[7] is concerned with whether upon an application for leave to discontinue an action the court would allow leave upon the terms that the plaintiff should not bring any other action on the same matter against the defendant and he should pay the defendants costs.

I shall now turn to the three cases — *Castanho*,[4] *Oversea Union Finance*[5] and *Covell Matthews*[8] cited by counsel for the first defendant which I have earlier said are relevant in assisting me to decide on the issue raised in the present case. To be able to understand the principles and rulings of the House of Lords in *Castanho v Brown & Root (UK) Ltd & Anor*[4] a brief narration of the facts as set out in the headnote is necessary. The plaintiff, a Portuguese subject resident in Portugal, was severely injured by an accident in February 1977 while he was employed by the second defendants, a Panamanian company, on an American ship lying in an English port. The first defendants, an English company, provided shore services for the ship. Both defendants were associates of a larger Texas based group of companies. While the plaintiff was in hospital in England, a writ was issued in September 1977 by English solicitors claiming damages for his injuries. On 22 March 1978 at the invitation of the defendants' solicitors, a consent order was made under the RSC O 29 r 9 for an interim payment of £7,250 to the plaintiff and a further order for an interim payment of £20,000 was made on 8 December 1878. During 1978 a firm of Texan attorneys contacted the plaintiff in order to persuade him to bring proceedings in Texas where higher damages could be obtained. On 8 February 1979, the

plaintiff executed a power of attorney giving the Texan firm exclusive powers to prosecute his claim in the United States and providing for them to be paid 1/3 of the sum recovered in an out of court settlement and 40% if the petition were filed and further providing that the English action was not to be concluded prior to the decision of the United States case. On 30 April 1979, after proceedings on the plaintiff's behalf had been commenced in a Texas state court, the defendants delivered a defence in the English action in which liability was admitted by the second defendants. On 14 May 1979 the plaintiff's English solicitors served a notice of discontinuance on the defendants under RSC O 21 r 2(i). In July 1979 a fresh action claiming compensatory and punitive damages was started on the plaintiff's behalf in a United States federal court in Texas and the proceedings in the state court were ended by filing a non-suit. At the hearing of the summons for direction of the defendants, it was directed that it be treated as an application to strike out the notice of discontinuance and the application was fixed for hearing before Parker J who, after hearing submissions of counsel, struck out the notice of discontinuance and granted an injunction restraining the plaintiff from commencing or continuing proceedings in the United States in respect of a claim for damages for the personal injuries he had sustained in the accident. On appeal by the plaintiff, who had issued a fresh writ in England to protect his position in case the court in Texas declined jurisdiction, the Court of Appeal by a majority (Lord Denning dissenting) set aside the order of the trial judge striking out the notice of discontinuance and discharged the injunction. In dissenting, Lord Denning MR said at p 80 of *Castanho v Brown & Root*:[3]

> Another way of reaching the same result is to hold as Parker J did, that once interim payments have been sought and received and spent, it is abuse of the process of the court to discontinue the proceedings without the leave of the court ... If it [a legal process] is used for the purpose of the party obtaining some collateral advantage for himself and not for the purpose for which such proceedings are properly designed and exist, he will be held guilty of abuse of the process of court. So here the notice of discontinuance was done without leave, so as to aid the American lawyers in obtaining 40% for themselves out of the American litigation. That was an abuse of the process of the English Court. If I am right in thinking that leave is necessary, then the court can do what is right and just. It can insist on repayment at once in cash, as a condition of giving leave to discontinue; or alternatively it can allow the plaintiff to retain the interim payments (and not repay them) on condition that no other action shall be brought for the same cause ... or it can refuse leave and insist on the case going to judgment.

The defendants appealed to the House of Lords against the majority ruling of the Court of Appeal. In dismissing the appeal Lord Scarman agreed with the propositions of Lord Denning. I shall cite only the statements of Lord Scarman which are relevant and they are those which appear at p 571 the reported case.[4]

> It is accepted that under the Rules of the Supreme Court as they were in 1979 ... the plaintiff, notwithstanding the two interim payments and the admission of liability, could discontinue without leave, if he did so not later than 14 days after service of defence ... Unless therefore, it is possible to treat a notice of discon-

A tinuance without leave which complies with the Rules of the Supreme Court as an abuse of process (which Parker J did) the notice *cannot* be struck out.

In the Court of Appeal Lord Denning MR was prepared so to hold. Brandon LJ expressed no opinion. Shaw LJ, however, held that it was not possible. It seemed to him 'an inversion of logic to speak of an act which purports to terminate a process as being an abuse of that process. I am not insensitive to the B logical difficulty. Even if it be illogical (and I do not think it is) to treat the termination of legal process as an act which can be an abuse of that process, principle requires that the illogicality be overidden, if justice requires. The court has inherent power to prevent a party from obtaining by the use of its process a collateral advantage which it would be unjust for him to retain: and termination of process can, like any other step in the process be so used. I agree, therefore, C with Parker J and Lord Denning MR that service of a discontinuation without leave, *though it complies with the rules, can be an abuse of the process of the court.* (Emphasis supplied.)

It is to be noted that in this case, the Texan lawyers, in order to urge the plaintiff to commence proceedings in the United States, had given an D understanding to the plaintiff to pay him his full monthly wages should his employers decide to dismiss or retire him and to refund all the interim payments to his employers and to pay all the legal costs and fees incurred by his English solicitors and to pay any other expenses incurred by him. The Texan lawyers gave the undertaking in the power of attorney of the plaintiff authorizing them to act for him because they were almost sure that E should the plaintiff commence proceedings in the United States he would win the case and would be awarded damages which would be within the region of $5 m out of which the Texan lawyers would get a contingency fee of 40% of the amount awarded. On account of such arrangement Lord Denning therefore stated that such an arrangement 'to English eyes was champertous in the extreme'. It was this champertous arrangement which F caused Lord Denning to hold that the taking out of the notice of discontinuance was to aid the American lawyers in getting their contingency fee. That was, together with the collateral advantage gained by the plaintiff in receipt of the interim payments, an abuse of the process of court. It is also important to take note that although Lord Scarman did not condemn the G champertous arrangement made by the Texan lawyers, nevertheless his Lordship in holding that there had been an abuse of the process of the court, said at p 572:

> Was it, then, in the circumstances of this case, an abuse? In my judgment, it was. A sensible test is that which both the judge and Lord Denning MR applied. H Suppose leave had been required (as it would have been, if the notice had been served 24 hours later), would the court have granted unconditional leave? It is inconceivable that the court would have allowed a plaintiff, who had secured interim payments and an admission of ability by proceeding in the English court, to discontinue his action in order to improve his changes in a foreign suit without being put upon terms, which could well include not only repayment of the I moneys received but an undertaking not to issue a second writ in England.

In *Oversea Union Finance Ltd v Lim Joo Chong*,[5] the plaintiff, a licensed moneylender, pursuant to a memorandum of agreement, granted a loan to the defendant who charged his land as security for the repayment of the loan and a memorandum of charge was also executed by both parties. The

defendant failed to repay the loan and after serving the statutory notice of default under Form 16D of the National Land Code 1965 without getting any response from the defendant, the plaintiff applied for an order for sale of the charged land. In his affidavit the defendant opposed the application for an order for sale on three grounds. For the purpose of this judgment, I need mention only the first of the three grounds and that is this:

(1) That the contract was unenforceable as the memorandum of agreement did not comply with s 16 of the Moneylenders Ordinance 1951 in that the date of the loan was not correctly stated and the terms of the loan were not correctly set out.

The plaintiff thereafter applied for leave to discontinue the action on the ground that even if the court were to grant an order for sale they, the plaintiff, would find difficulty in selling the property, it being a residence and in an area where the value had fallen and his application was opposed by the defendant. Raja Azlan Shah J (as he then was) found that the plaintiff had no answer to the first ground raised by the defendant. His Lordship, in dismissing the application for a discontinuation of the action, said at p 126:

> If the applicant here is *dominis litis* then leave to discontinue may be granted. If he is not, then it is unlikely that I would grant him leave to discontinue. I do not think that the applicant is wholly *dominis litis*. He cannot dispose of the case as he thinks fit or allow it to be dismissed or let judgment go by default. The parties have come to a stage where the respondent/chargor has gained an upper hand by an advantage in that he could find flaws in the applicant/chargee's allegations, namely, the wrong dates in the memorandum etc *and the fact that the reason for wanting a discontinuance is not a very strong one.* The respondent/chargor is not to be deprived of these advantages which have made him a well-matched adversary in the arena. (Emphasis is mine.)

Again it is to be noted that in this case the plaintiff should not have commenced the action for an order of sale when the memorandum of agreement for the loan was void in law. Having done so and then faced with an impregnable defence, the defendant should not be deprived of obtaining from the court a ruling that not only should the application for an order of sale be dismissed but also the consequential ruling that the charge of the land was null and void. The plaintiff should not be allowed to hold on an illegal charge. It is also to be noted that the ground for discontinuing the action was found by the learned judge to be a weak one.

The last case cited by counsel for the first defendant is the case of *Covell Matthews & Partners v French Wools Ltd.*[8] This is a tenancy case. The plaintiff was the tenant of certain premises belonging to the defendant. When the tenancy agreement was about to expire the plaintiff gave notice that they would not give up possession of the premises and wanted the defendant as landlords to grant them a new tenancy. Having got no response from the defendant, the plaintiff issued an originating summons seeking an order for the grant by the landlords of a new tenancy of the premises in accordance with ss 24 and 29(2) of the Landlord and Tenant Act 1954. Negotiations between the parties as to the terms and conditions of a proposed new tenancy took place and the hearing of the originating

summons was postponed from time to time. There was a dispute whether terms for a new lease were finally agreed or not; the landlords said that they were and the tenants said they were not. Some time later the tenants left the premises and thereafter served on the landlords an application for leave to withdraw the originating summons and requesting a new tenancy. Prior to that the landlords had written a letter to the tenants stating that there was a binding contract to grant a new lease on terms therein set. After the tenants had filed their application for leave to discontinue, the landlords commenced proceedings for specific performance of the alleged contract. In addition to the proceedings commenced by the landlords, they also issued a summons to determine interim rent in accordance with the provisions of s 24A of the 1954 Act. The learned trial judge allowed the tenants' application for a discontinuation of the action subject to certain conditions which I shall set out presently. In doing so the learned trial judge said at p 594:

> The principles to be culled from these cases [cited by counsel for the defendant] are, in my judgment, that the court will, normally at any rate, allow the plaintiff to discontinue if he wants to, provided no injustice will be caused to the defendant. *It is not desirable that a plaintiff should be compelled to litigate* against his will ... but in doing so [the court] should be careful to see that the defendant is not deprived of *some advantage which he has already gained* in the litigation and should be ready to grant him adequate protection to ensure that any advantage he has gained is preserved. (Emphasis supplied.)

The conditions set down by the learned trial judge in allowing the plaintiff to discontinue the action can be found at p 594 where he said:

> In my judgment, therefore, I think that in principle the master was correct in his grant of leave to the tenants to withdraw their application of 13 March 1973 for a new tenancy and I hold that such leave should be given. At the same time, for the landlords' protection, the order being for leave to discontinue and not for dismissal, the tenants should be put on terms: (1) not to make any fresh application for a new tenancy; this may in fact be academic in view of the time which had elapsed since the first application, but such a term positively safeguards the position; (2) the grant for leave should, as requested by counsel for the landlords, be expressed to be given without prejudice to the landlords' contention that a binding agreement has been reached between the parties, and without prejudice to the effect of such agreement if it is eventually decided that it is binding; (3) an appropriate order for costs against the tenants should be made.

The principles that can be extracted from the aforementioned cases are that the court would not compel a plaintiff to continue his action against a defendant if he does not want to do so provided no injustice is caused to the defendant. Injustice would be caused to the defendant if:

(1) the discontinuance was made with ulterior motive to obtain a collateral advantage as in the case of *Castanho v Brown & Root Ltd*;[4]

(2) the discontinuance was not made bona fide by the plaintiff but it was made in order to obtain an advantage to which he has no right to retain since he has ceased to be *dominis litis* as the defendant has a perfectly good defence — see *Oversea Union Finance Ltd v Lim Joo Chong*;[5]

(3) by the discontinuance of the action the defendant would be deprived of an advantage which he has already gained in the litigation — see *Covell Matthews & Partners v French Wools Ltd.*[8]

Transposing the above-mentioned principles to the present case, it certainly cannot be said that the plaintiff's filing of the notice of discontinuance was done with an ulterior motive to gain a collateral advantage. On this point it is to be noted that the plaintiff in this action was suing not only the first defendant but also the second defendant, who was the main contractor of the Selangor State Mosque Shah Alam. The relief prayed for by the plaintiff against the second defendant was 'an order that the second defendants pay the plaintiffs directly all sums certified by the third defendants as due to the plaintiffs'. The third defendant was the consulting architect of the project whose duties were, among other things, to certify progressive payments. Having got judgment in default of appearance and defence against the second defendant, the plaintiff is entitled to require the second defendant to pay all moneys lawfully due to the plaintiff. In the circumstance the plaintiff has no reason to continue the action against the first defendant against whom he was also claiming for moneys due to him under the sub-contract. Secondly, in its application made by summons-in-chambers dated 20 April 1988 (encl 9), the first defendant sought for several orders the most relevant of which was an order to stay the proceedings pursuant to s 6 of the Arbitration Act 1952 on the grounds that the plaintiff and the first defendant had by an agreement in writing dated 27 March 1986 agreed to refer to arbitration the matters in respect of which this action was commenced. By asking for such an order it certainly cannot be said that the first defendant had obtained an advantage in the litigation of which it would be deprived of if the plaintiff were allowed to discontinue the action against the first defendant. All that it was asking for was *an opportunity* to have the disputes arising from its agreement with the plaintiff referred to arbitration. That being so the discontinuance of this action against it would not deprive it of the opportunity — the first defendant can even now require the plaintiff to refer their disputes to an arbitrator. Should the plaintiff turn down his request for arbitration the first defendant can still come to this court for an order directing the plaintiff to refer the disputes to arbitration. Thirdly, in his submission counsel for the first defendant contended strongly that the first defendant had a right to ask the court to revoke the injunction obtained by the plaintiff on 14 March 1988 (encl 5) as it was entitled to such an injunction since in law an interlocutory injunction cannot be obtained to prevent money being paid out to a third party unless the injunction granted was a Mareva injunction. Counsel has a strong point but unfortunately the injunction had already been vacated by this court on 12 October 1990 upon the application of the plaintiff on the ground that since final judgment against the second defendant had been granted by this court on 31 March 1989 the said interlocutory injunction had been rendered nugatory. Furthermore the plaintiff had already obtained an order from the senior assistant registrar ('SAR'), an order on 31 March 1989 directing that the second defendant must pay all sums certified by the third defendant as due to the plaintiff within two days from the date

of service of the order. As there is no injunction in existence and in view of the afore-mentioned order made by the SAR, the question of whether the injunction was rightly or wrongly granted is purely academic.

For the above reasons, the notice of discontinuance issued by the plaintiff is prima facie valid. I say 'prima facie' because the matter does not end here. Although the point which I am going to discuss was not raised by counsel for the plaintiff or counsel for the first defendant, I feel that since it is an important question of law it is incumbent to me to consider that point.

To discuss the point which I mentioned in the above paragraphs, it is necessary to set out in full the provisions of O 21 r 2(1) of the RHC:

> The plaintiff in an action begun by writ may, without the leave of the Court, discontinue the action, or withdraw any particular claim made by him therein, as against any or all of the defendants at any time not later than 14 days after service of the defence on him or, if there are two or more defendants, of the defence last served, by serving a notice in Form 36 to that effect on the defendant concerned.

The crucial words are 'or, if there are two or more defendants, of the defence last served'. These words clearly show that should there be a plurality of defendants the 14 days would start to run from the date of the defence served by the last defendant on the plaintiff. However, if any one of the defendants failed to file his defence on or before the statutorily stipulated or mutually agreed date for the filing of defence the plaintiff can give a notice of discontinuance 14 days after the termination of the said date. This is provided in O 21 r 2(3) of the RHC which reads:

> Where there are two or more defendants to an action not all of whom serve a defence on the plaintiff, and the period fixed by or under these rules for service by any of those defendants of his defence expires after the latest date on which any other defendant serves his defence, paragraph (1) shall have effect as if the reference therein to the service of the defence last served were a reference to the expiration of that period.

In the English *Supreme Court Practice* (1985 Ed) at p 359 it is said:

> In relation to an action begun by writ, under the combined effect of rr 2(2) and 3(3) a plaintiff may serve a notice of discontinuance or withdrawal of any particular claim at any time before the service on him of the defence of the defendant or if there are two or more defendants, of the defence last served, but the last date on which he can effectively serve such a notice is as follows:
>
> (a) where there is only one defendant, not later than 14 days from the service of his defence;
>
> (b) where there are two or more defendants, either not later than 14 days from the service of the defence last served or, if any defendant does not serve a defence, not later than the date fixed for the service of such defendant's defence expires, whichever is the later.

Again in *Mallal's Commentaries of the Rules of High Court 1980* it is likewise stated at p 261 that:

> If not all the defendants to the claim serve any defence, then the time from which the 14 days period shall run from the expiry of the period for the service of the defence of the party in default.

Now under O 19 r 2 of the RHC it is provided that where the writ is endorsed with a statement of claim (and in the present case the writ was so endorsed) and the defendant has entered an appearance (again in the present case the first defendant did enter a conditional appearance on 15 April 1988), he must serve his defence within 14 days from the time limited for appearance (which in the present case the first defendant had never filed and served its defence at all). The plaintiff should therefore give notice without leave of court to discontinue the action against the first defendant at the latest between the first week or second week of May 1988 and not to wait until 22 June 1990 to file his notice of discontinuance. He must get the leave of this court to do so which he never did. His notice of discontinuance is therefore bad and should be rejected. Be that as it may this court can still grant leave to the plaintiff to discontinue the action against the first defendant pursuant to O 21 r 3(1) of the RHC because had the plaintiff sought leave to discontinue, as he should have done, the logical course for this court to follow would be to give leave to discontinue simply because it is pointless for him to continue the action against the first defendant after having entered final judgment in default against the second defendant who, pursuant to the judgment in default, the second defendant is bound to pay the plaintiff whatever payments were duly certified by the third defendant. More importantly, as stated above, the discontinuance of the action against the first defendant can in no way cause injustice to the first defendant. However that may be the leave to discontinue the action against the first defendant can only be granted subject to certain conditions (see *Castanho v Brown & Root*[4] at p 577, *Robertson v Purdey*[7] at pp 617-618 and *Covell & Partners v French Wools Ltd*[8] at p 594). It is my considered opinion that the proper order that this court should make is that leave to discontinue the action against the first defendant is granted to the plaintiff subject to the following conditions:

(1) That the plaintiff should not institute a fresh action against the first defendant on the same matter set out in the present suit.
(2) That the grant of leave is given without prejudice to the first defendant's right to institute action under the Arbitration Act 1952 to require the plaintiff to refer the disputes (if any) arising out of the agreement entered between the two parties to arbitration.
(3) That the application of the first defendant in encl 9 is dismissed without any order as to costs.
(4) That costs of proceedings relating to the service of the invalid notice of discontinuance and the leave allowing him to discontinue the action against the first defendant be paid by the plaintiff to the first defendant.

Order accordingly.

Reported by PS Ranjan